No. 21,943

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN MOHLAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Herman Mohland (herein called "petitioner") to review and set aside an order of the National Labor Relations Board (R. 37-38)[1/] issued on March 31, 1967, dismissing an unfair labor practice complaint against Hoerner-Waldorf Paper Products Co. (herein called "the Company"). Petitioner was the charging party before the Board. The Board's decision and order, issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.),[2/] are reported at 163 NLRB No. 105. This Court has jurisdiction under

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1/ References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" are to the General Counsel's exhibits. Those designated "EX" are to the exhibits of the employer (Hoerner-Waldorf Paper Products Co.), respondent before the Board. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

2/ The pertinent provisions of the Act are set forth in the Appendix.

Section 10(f) of the Act, the alleged unfair labor practices having occurred in Missoula, Montana.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that employee Herman Mohland, petitioner herein, was discharged for cause and not as a reprisal for his union activities. Accordingly, the Board dismissed the complaint in its entirety. The evidence upon which the Board based its findings is summarized below:

a. Background

Hoerner-Waldorf Paper Products Co., a Delaware Corporation with its principal offices in St. Paul, Minnesota, is engaged at Missoula, Montana, in the manufacture of paper board (R. 15; 4, 9). At all times material herein, the Company operated under a collective bargaining agreement with the Union[3/] (EX 1).

Herman Mohland, a union member, was hired by the Company in April 1962. In December 1965, he requested that he be transferred to the maintenance department (R. 17, 20; Tr. 52, 58, 64). Mohland, who was then 34 years old, was informed by Company officials before his transfer that the training program for progression in the maintenance department was, as a matter of practice, restricted to employees under age 30 (R. 20; Tr. 211-213). In fact, the Union had requested a formalized training program in the autumn of 1965, and a joint union-management committee had drafted a proposal which, except in the case of employees with prior mechanical experience, was specifically limited to employees under age 30 (R. 20; Tr. 95, 108-109, 211-212, 216).

3/ International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO.

Mohland voiced his opposition to the age requirement at union meetings and the proposal was rejected by the union membership in December 1965. A counterproposal, deleting the age restriction, was rejected by the Company on January 27, 1966 (R. 20; Tr. 59-63, 110-111, GCX 10). In April 1966, Mohland filed a grievance alleging that he had been unfairly denied a promotion because of his age (R. 21; Tr. 66-67, 213, GCX 5).

b. The Company initiates new timecard procedures; Mohland refuses to comply with these procedures and is discharged

On March 11, 1966, the Company installed new time clocks. Employees were instructed to fill in the amount of straight time, overtime, and total hours worked on the new daily timecards (R. 17; Tr. 192, 194). Mohland complied with the instructions until April 15, 1966, when employee Bob Reed told him that he had been underpaid by the Company after mistakenly recording several hours of overtime as straight time (R. 17; Tr. 73-74, 150-151). In discussing Reed's story with other employees, Mohland learned that employee Dave Palmer had been paid straight time for working on a holiday after making a similar mistake on his timecard (R. 18; Tr. 75).[4/]

After April 15, 1966, Mohland refused to fill in the columns on his timecard for straight time, overtime, and total hours worked (R. 18; Tr. 74). Employees Wally Tucker and Jace Dove also refused to complete their timecards after mid-April (R. 21; Tr. 164-166, 169-170). Until mid-May, Mohland's timecards were completed by Maintenance Foreman Norm Carlson, who assumed that Mohland's failure to fill in the missing

4/ Both Reed and Palmer were subsequently paid for the correct amount of overtime (R. 17, n. 4, R. 18, n. 5).

rormation was inadvertnet (R. 18; Tr. 192-194). Pat Nelson, the super-
ior who handled Dove's and Tucker's cards, was also unaware of any
r entional refusal to comply with the Company's instructions (R. 21, 22;
r 266-268). During the first week in May, however, Foreman Carlson
eame aware that Mohland was repeatedly failing to complete his card and
icussed the problem with his supervisor, Herman Effenberger.
fenberger directed Carlson to send the incomplete cards into the
fice, thus delaying Mohland's pay. At Effenberger's suggestion,
alson also reprimanded Mohland on May 16 (R. 18; Tr. 193, 198-199).
hn Carlson attempted to explain how to fill in the timecards properly,
oland replied that he understood the procedure, but that "since the
opany was making it a practice to cheat the men," he did not want to
cept the responsibility for mistakes on his timecard (R. 18; Tr. 76).
alson then warned him that if his cards were not completed properly
w would not be signed and his pay would be delayed (R. 18; Tr. 77,
9). Mohland completed his timecard that afternoon (R. 18; Tr. 77-78).

However, on the following day, May 17, Mohland again failed
o complete his timecard. That night, a resolution that all union
ers refuse to compute their own time, drafted and vigorously
coted by Mohland, was unanimously passed at the union meeting (R. 18;
78-79). On May 18 and 19, Mohland again refused to comply with the
structions and was reported by Lead Mechanic Martin Hegel to
ffenberger, who in turn reported Mohland's insubordination to Produc-
io Manager Robert Sallee. Sallee immediately called for a meeting
tween Company and Union representatives to determine whether Mohland

had actually refused to obey the Company's posted rules and the instructions given him by his foreman on May 16 (R. 19; Tr. 209-210, 260-261).

At the meeting on the morning of May 20, 1966, which was attended by Sallee, Carlson, Personnel Manager Robert Prouty, Union President Wallace Lowell, and Union Standing Committee Chairman Pat Colyer, Mohland was asked why he had not been completing his timecards as instructed (R. 19; Tr. 82-83). When Mohland referred to the Union resolution posted on the bulletin board on May 19,[5/] Sallee stated that he was concerned with Mohland's behavior on May 16 and 17, prior to the resolution. Mohland then related the experiences of Reed and Palmer, and repeated his assertion that he did not want to accept responsibility for mistakes in timekeeping. (R. 19; Tr. 83-84). In response to further questioning, he admitted that he had read and understood the Company's instructions with respect to the timecards. Sallee then said, "As much as I regret to do this, I have no other choice than to discharge you immediately, exercising our right as guaranteed in the contract for disobedience." (R. 19; Tr. 84).[6/]

5/ An estimated 90% of the men complied with the resolution (R. 21; Tr. 269).

6/ Section 28 of the contract between the Company and the Union specifies disobedience and refusal to comply with posted rules as causes for immediate discharge (EX 1).

Later that day, Sallee and Union President Lowell agreed to resolve the timecard dispute through the grievance procedure and the Union resolution was rescinded (R. 19-20; Tr. 246, EX 16). At a labor-management meeting one week later, the Company agreed that thereafter only the total hours spent on each job would be recorded by the employees (R. 20; Tr. 242-244).

On May 24, 1966, Mohland filed charges with the Board alleging that his discharge had violated Section 8(a)(3) and (1) of the Act and that the Company's refusal to supply the Union with certain information had violated Section 8(a)(5) and (1) of the Act (R. 16; 3). Shortly before June 6, he filed a grievance relating to his discharge (R. 16; EX 6). It was processed through the first three steps specified by the contract; then, after agreeing to bypass the fourth step, the Company and the Union agreed to proceed to arbitration (R. 16; Tr. 20-24, 49-50). The Company moved that Board proceedings, pursuant to the Complaint which had been issued on July 18, 1966, be deferred pending completion of arbitration. On September 27, 1966, the motion was denied (R. 16; 4-6, 11-13, 14), and arbitration proceedings have not been held (R. 17).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that Mohland was discharged for cause and not because of his protected union activities. Accordingly, the Board adopted the Trial Examiner's recommendation that the complaint be dismissed in its entirety. 7/

7/ The Board further found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with information necessary for administration of the contract and for future negotiations, but concluded, in view of the fact that the information had been given to the Union before the hearing, that the purposes of the Act would not be effectuated by the issuance of a remedial order. Review is not being sought of this portion of the order.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT EMPLOYEE HERMAN MOHLAND WAS DISCHARGED FOR CAUSE AND NOT BECAUSE OF HIS UNION ACTIVITIES.

As shown in the Counterstatement, the Company's instructions for completing its new time-cards were posted and explained to the employees on March 11, 1966. The Union voiced no immediate objection to the new system, which made the employees responsible for properly recording their own straight time, overtime, and total hours worked. After mid-April 1966, however, petitioner, admittedly acting as an "individual" (Tr. 106), refused to comply with the Company's rules. He did not relay his complaint to the Company's management, nor did he inform his union steward of his actions or attempt to make use of the grievance procedures available for the resolution of such disputes. In fact, he continued his defiance of managerial authority even after the Union discussed the problem with company officials at a labor-management meeting on May 3, 1966, and agreed that, because of the Company's limited clerical staff, the employees should bear the responsibility for properly recording their own time (Tr. 135-136). Finally, he disregarded the specific warning communicated to him by Foreman Carlson on May 16, 1966.

It is settled law that such insubordinate conduct, amounting to a refusal to perform assigned tasks during working time, falls outside the protection of Section 7 of the Act and constitutes adequate cause for discharge. See, e.g., Machaby v. N.L.R.B., 377 F. 2d 59 (C.A. 1); N.L.R.B. v. Camco, Inc., 369 F. 2d 125, 128-129 (C.A. 5); N.L.R.B. v.

Louisiana Mfg. Co., 374 F. 2d 696, 705-706 (C.A. 8); N.L.R.B. v. Ace Comb Co., 342 F. 2d 841, 847-848 (C.A. 8); N.L.R.B. v. Red Top Cab & Baggage Co., _____ F. 2d _____, 66 LRRM 2311, 2317-2318 (C.A. 5, No. 21,316, decided October 6, 1967). Moreover, Mohland's conduct between May 3 and May 17 was at odds with the position taken by his bargaining agent. Courts have recognized that the use of disruptive tactics by individual union members or dissident groups may interfere with, rather than promote, the protected right to bargain collectively. N.L.R.B. v. Sunset Minerals, Inc., 211 F. 2d 224, 226 (C.A. 9); N.L.R.B. v. R. C. Can Co., 328 F. 2d 974, 978-979 (C.A. 5); N.L.R.B. v. Sunbeam Lighting Co., 318 F. 2d 661, 662-663 (C.A. 7); Plasti-Line, Inc. v. N.L.R.B., 278 F. 2d 482, 486 (C.A. 6). The fact that the Union later reversed its position and adopted Mohland's tactics, however, does not, as the Board noted, justify his earlier defiance of both posted rules and the direct verbal instructions of his foreman.[8/]

Even assuming, arguendo, that Mohland's termination was attributable in part to his continued refusal to complete his timecard after the resolution, the Board's decision was proper. It has been established that ". . . the protective mantle of Section 7 is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient

8/ Production Manager James Sallee testified that Mohland's discharge had been predicated on his disobedience on May 16 and 17, before the Union resolution (Tr. 230).

operation of the employer's business." Caterpillar Tractor Co. v. N.L.R.B., 230 F. 2d 357, 358 (C.A. 7). Accord: Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 797-798. In the instant case, the contract provisions for processing grievances concerning the terms and conditions of employment were unquestionably adequate.[9/] The employees, however, elected to take matters into their own hands by remaining at work and accepting pay, but, without resorting to the grievance procedure, refusing to comply with the disputed rule. While Section 7 of the Act affords protection to a wide variety of concerted activities for the purpose of effecting changes in working conditions, including, in certain circumstances, the right to strike,[10/] not all concerted activities are protected. U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245, 260-261; N.L.R.B. v. Blades Mfg. Corp., 344 F. 2d 998, 1004-1006 (C.A. 8), and cases cited therein. See also, N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 492-494. The Act does not guarantee to employees the right to "insist on remaining at work on their own terms and conditions." N.L.R.B. v. Kohler Co., 220 F. 2d 3, 11 (C.A. 7). See also Machaby v. N.L.R.B., 377 F. 2d 59 (C.A. 1). They must remain "on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." C.G. Conn Ltd. v. N.L.R.B., 108 F. 2d

9/ As shown, supra, p. 6 , the Company and the Union later resolved the dispute through the grievance procedure.

10/ It should be noted that in this case the Union was bound by a contract provision prohibiting any "interruption of work" during the term of the agreement (EX 1, Sec. 5). The Board did not decide whether or not the Union's resolution in this case violated that clause (R. 22).

390, 397 (C.A. 7). Accord: N.L.R.B. v. J. I. Case Co., etc., 198 F. 2d 919, 922 (C.A. 8), cert. denied, 345 U.S. 917; Home Beneficial Life Ins. Co. v. N.L.R.B., 159 F. 2d 280, 286 (C.A. 4).[11/] In the instant case, we submit, the form of protest initiated by petitioner and later adopted by the Union was clearly unreasonable in light of the ends sought to be achieved and the alternative methods available. Cf. Dobbs Houses, Inc. v. N.L.R.B., 325 F. 2d 531, 538-539 (C.A. 5). Accordingly, Mohland's continuing defiance of instructions left him vulnerable to lawful discharge.

The only question remaining, then, is whether substantial evidence on the record as a whole supports the Board's finding that petitioner was discharged because of his insubordination.[12/] He contends that he was discharged because of his vigorous opposition to the proposed training program, his filing of a grievance concerning the Company's failure to promote him, and his actions in drafting and promoting the union timecard resolution. It is settled, however, that "engaging in protected concerted activitiy, such as filing grievances, does not immunize employees against discharge for legitimate reasons. The burden of proof

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11/ See also Morrison-Knudsen Co., Inc. v. N.L.R.B., 358 F. 2d 411, where this Court, in finding employee protests over allegedly unsafe working conditions to be protected, noted that they were "within permissible bounds and * * * did not, as the Company contended, usurp the authority of the foreman or interfere with the latter in directing the work." (358 F. 2d at 414-415).

12/ Petitioner errs in contending (br. pp. 23-26) that it was violative of federal law for the Company to require the employees to record their own time on their timecards. Under Section 11(c) of the Fair Labor Standards Act (29 U.S.C., Sec. 211(c)), employers are responsible for the record-keeping requirements of the Act. However, an employer may delegate certain portions of such record-keeping to his employees, with ultimate responsibility for such record-keeping resting on the employer. Goldberg v. Cockrell, 303 F. 2d 811, 812 n. 1 (C.A. 5).

is still upon the General Counsel to show that the protected activity was a cause of the discharge." Hawkins v. N.L.R.B., 358 F. 2d 281, 283-284 (C.A. 7). Accord: R. J. Lison Co., Inc. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9); Lozano Enterprises v. N.L.R.B., 357 F. 2d 500, 502-504 (C.A. 9); Shattuck Denn Mining Corp. (Iron King Branch) v. N.L.R.B., 362 F. 2d 466, 468-469 (C.A. 9), and cases cited therein. Accordingly, circumstances which "merely raise a suspicion" of unlawful motivation will not support a finding of discriminatory discharge. Lozano Enterprises v. N.L.R.B., supra, 357 F. 2d at 503.

Thus, the Board found that the incidents which petitioner contends were the real reason for his discharge occurred over a period of 6 months preceding the Company's decision to terminate him. Although Company officials knew that Mohland's opposition had prevented ratification by the Union of the proposed training program (R. 21; Tr. 225), the record reveals no evidence of hostility toward him in the following months. It appears unlikely that any basis for hostility existed, in light of the uncontradicted testimony by a Company official that the Union itself had originally proposed the plan and that the Company had no particular interest in its adoption. As Production Manager Sallee testified, the Company had enjoyed "considerable latitude in training maintenance personnel" under the informal training program already in existence. (Tr. 216). His statement to union representatives that Mohland's opposition was "their problem, not ours" illustrates the Company's lack of concern at the failure to agree on a program (Tr. 225).

Similarly, the record failed to establish any connection, other han proximity in time, between petitioner's discharge and his grievance oncerning the Company's failure to promote him. No evidence of Com- any hostility or attempts to frustrate its processing was presented. n fact, the Company's representative stated that he felt it involved a basic issue" and agreed to refer it to a more advanced stage in the rievance procedure (R. 21; Tr. 114-116). In these circumstances, as his Court observed in Lozano, supra, unlawful discrimination cannot be nferred from "mere union activity or membership, followed by discharge" 357 F. 2d at 502).

As to the contention that Mohland was discharged because he rafted and vigorously promoted the union timecard resolution, the Eard's finding that the Company had no knowledge of his part in its doption seems dispositive. Proof that an employer knew of his employee's protected activity is, of course, essential to a finding that the eployee was discharged for engaging in that activity. Salinas Valley Boadcasting Corp. v. N.L.R.B., 334 F. 2d 604, 613 (C.A. 9); N.L.R.B. v. Sbastopol Apple Growers Union, 269 F. 2d 705, 711 (C.A. 9); N.L.R.B. v. Kiser Aluminum & Chemical Corp., 217 F. 2d 366, 368 (C.A. 9); N.L.R.B. v Ace Comb Co., 342 F. 2d 841, 848 (C.A. 8). Petitioner's argument (c. pp. 17-18) that the Company must have known of Mohland's part in the union resolution of May 17, is based only on speculation which, of urse, cannot substitute for proof.

Petitioner points to the fact that other employees who also fused to complete their timecards were not discharged or otherwise isciplined. The Board found, however, that the Company's management

id not become aware of Tucker's and Dove's refusals until well after ohland's discharge. Production Manager Sallee's credited testimony ndicates that, although he had learned of the union resolution posted n May 19, he did not know at the time of Mohland's discharge that any :her employees had refused to complete their timecards (R. 22; Tr. 214, 27).[13/] The Board, we submit acted reasonably in concluding from the ove testimony that Mohland's dismissal was not, as he contends, a scriminatory application of company rules. See, e.g., N.L.R.B. v. T. Grant Co., 315 F. 2d 83, 84-86 (C.A. 9). The fact that Mohland s given an explicit warning by his foreman and afforded an opportunity t abandon his insubordinate tactics further refutes the contention that te Company was looking for an excuse to discharge him.

Finally, petitioner asserts (br. p. 32) that the Company's dcision to discharge him, rather than impose some less severe displinary measure, evidences its unlawful motivation. This argument i without merit. It is settled law that when conduct warranting disciplinary action has been established, the extent or severity of tlat action is normally within the discretion of the employer, not tle Board. N.L.R.B. v. Ace Comb. Co., supra, 342 F. 2d at 847; N.L.R.B. v. Ogle Protection Service, Inc., 375 F. 2d 497, 505 (C.A. 6). Se also, N.L.R.B. v. Sebastopol Apple Growers Union, supra, 269 F. 2d

13/ It is settled that credibility resolutions are matters for determination by the trier of fact which, if reasonable, will not be disturbed upon review. R. J. Lison Co. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9); N.L.R.B. v. Local 776 IATSE (Film Editors), 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826.

t 712-713, and cases cited therein. Although disciplinary action which s wholly disproportionate to the employee's offense may be a factor which he Board may take into account, together with other circumstances, in scertaining the employer's motivation, the record in the instant case iewed as a whole, fails to establish that the Company seized upon petiioner's insubordination as a pretext to get rid of him because of his articipation in any protected activity.

In sum, the record provides ample basis for the Board's inding that petitioner was discharged, not because of his protected ctivities, but because of his admitted insubordination. The question s one of "actual motive, a state of mind" (Shattuck Denn Mining Corp. . N.L.R.B., supra, 362 F. 2d at 470), and this Court's function upon eview is a limited one. "When the record evidence concerning an mployer's motivation in discharging an employee will reasonably ermit of two fairly conflicting views, a reviewing court will not isplace the choice of the Board." Hawkins v. N.L.R.B., 358 F. 2d 281, 83 (C.A. 7).[14/] In the above circumstances, the Board's inference as, at the least, reasonable.

4/ Accord: N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405; R. J. Lison Co. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review and set aside the Board's order should be denied.

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December 1967.

CERTIFICATE

The undersigned hereby certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations ct, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.) re as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organiza- ion, to form, join, or assist labor organizations, to bargain collec- ively through representatives of their own choosing, and to engage in ther concerted activities for the purpose of collective bargaining or ther mutual aid or protection, and shall also have the right to refrain com any or all of such activities except to the extent that such right ay be affected by an agreement requiring membership in a labor rganization as a condition of employment as authorized in section (a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for n employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

APPENDIX B

INDEX TO REPORTER'S TRANSCRIPT

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General Counsel's Exhibits

No.	Identified	Offered	Received in Evidence
1(a) through 1(j)	4	4	4
2	53	54	54
3	55	56	56
4	57	58	58
5	67	69	69
6	71	73	73
7	80	80	80
8	85	86	86
9	86	87	88
10	110	118	118
11	131	132	132
12	181	181	(Rejected)
13	204	205	205

Respondent's Exhibits

No.	Identified	Offered	Received in Evidence
1	19	20	20
2	19	20	20
3	22	23	23
4	22	23	23
5	24	25	25
6	26	28	28